

See Kui Seng Realty Sdn Bhd v Sam Yep Foo & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02-2742
OF 2010

SYED AHMAD HELMY, BALIA YUSOF AND MOHAMAD ARIF JJCA
6 MAY 2013

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*Civil Procedure — Appeal — Interference by appellate court — Insufficient
judicial appreciation of evidence — Whether evidence tendered supported finding
— Whether appellate interference justified*

C

*Contract — Formation — Concluded contract — Sale and purchase of land —
Whether parties agreed to fundamental terms — Whether fundamental term
satisfied — Whether contract concluded*

D

*Contract — Sale and purchase of land — Specific performance — Contract for
purchase of shop houses — Deposit of RM1,000 paid — Failure of purchaser to pay
balance of deposit and execute agreement within stipulated period — Purchaser
unable and unwilling to perform their obligation — Vendor refusing to proceed
with sale — Whether purchaser could seek specific performance of agreement*

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The appellant owned two shop houses. The respondents agreed to buy the two shop houses at a price of RM145,000 each from the appellant. On 5 February 1991 the respondents paid a deposit of RM1,000 to the appellant and both parties agreed that the balance of the deposit amounting to RM28,000 was to be paid on 6 February 1991. The receipt issued by the appellant stated 'being payment of deposit for shop house 146 & 147 and balance of 10% of the price (RM290,000) will be paid on 6 February 1991.' The respondents deposited with their solicitors a cheque for RM28,000 being payment of the balance of the 10% deposit. The respondents' solicitors prepared the sale and purchase agreements ('SPA') and the respondents signed it. However, instructions were given to the solicitors not to release the said cheque to the appellant until the latter had executed the SPA and had obtained the redemption statements on the properties. On 3 June 1991, about four months later, the respondents' solicitors wrote to the appellant requesting for the redemption statement and informed the appellant that they had prepared the SPA. However, the appellant's solicitors replied saying that the respondents had breached the agreement in failing to pay the balance of the deposit on 6 February 1991 and as such had repudiated the agreement. Nevertheless, the appellant was still prepared to go on with the deal at the same price but subject to the balance of 10% deposit be paid within seven days from 3 August 1991 and the balance of

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- A the purchase price be paid within one month from the date of payment of the deposit. The respondents did not agree that the balance purchase price was to be paid within one month of the date of payment of the deposit. The Appellant's solicitors thus refunded the RM1,000 deposit paid earlier stating that no agreement was concluded. The respondents filed this suit seeking
- B specific performance of the SPA and alternatively claiming damages for breach of contract. The learned judicial commissioner ('JC') allowed the respondents' claim and ordered a formal sale and purchase agreement be made between the parties on the terms as agreed on 5 February 1991. Being dissatisfied with the decision, the appellant filed the instant appeal claiming that the JC had erred in
- C ruling that there was an open contract. The respondents submitted there was a contract formed on 5 February 1991 when the respondents paid RM1,000 as part of the deposit.

Held, allowing the appeal with costs:

- D (1) The cheques issued by the respondents on 6 February 1991 were useless as there were insufficient funds in the account. Coupled with that, the figure stating the amount in the cheques was also incorrect. The dates were also wrong. The second respondent admitted that there was an
- E insufficient fund in the account and that he had purposely put a different date and wrong figures on the said cheques. The appellant's name which was written in Chinese characters was also incomplete (see para 20).
- F (2) The respondents were not only unable to perform their part of the bargain but were unwilling to do so. The appellant could not be blamed for terminating the contract on the fault and failure of the respondents themselves. It is settled that a litigant cannot benefit from his own wrong (see paras 23–24).
- G (3) From the factual matrix of the matter, the stipulation as to payment of the balance purchase price was a fundamental term to the contract. This term had not been agreed to by the parties. The parties were not *ad idem* on that fundamental issue of payment of the purchase price. With this fundamental term left unsatisfied, there could not have been a concluded contract (see para 31).
- H (4) Appellate interference is necessary and will take place in cases where there has been an insufficient judicial appreciation of evidence. The JC had seriously fallen into error in concluding that 'the contract of sale between the parties had crystallised on 5 February 1991'. The evidence tendered did not support that finding (see paras 32–33).

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[Bahasa Malaysia summary]

Perayu memiliki dua buah rumah kedai. Responden-responden bersetuju untuk membeli dua buah rumah kedai tersebut pada harga RM145,000 setiap satu daripada perayu. Pada 5 Februari 1991 responden-responden membayar

deposit sebanyak RM1,000 kepada perayu dan kedua-dua pihak bersetuju bahawa baki deposit berjumlah RM28,000 perlu dibayar pada 6 Februari 1991. Resit yang dikeluarkan oleh perayu menyatakan 'sebagai bayaran deposit untuk rumah kedai 146 & 147 dan baki 10% daripada harga (RM290,000) akan dibayar pada 6 Februari 1991.' Responden-responden menandatangani sekeping cek berjumlah sebagai bayaran baki 10% deposit kepada peguam cara mereka. Peguamcara responden-responden menyediakan perjanjian jual dan beli ('PJB') dan responden-responden telah menandatangani. Walau bagaimanapun, arahan-arahan diberikan kepada peguam cara adalah untuk tidak memberikan cek tersebut kepada perayu sehinggalah perayu memeterai PJB dan mendapatkan penyata penebusan ke atas hartanah tersebut. Pada 3 Jun 1991, kira-kira empat bulan selepas itu, peguamcara responden-responden menulis kepada perayu meminta penyata penebusan dan memaklumkan perayu bahawa mereka telah menyediakan PJB. Walau bagaimanapun, peguamcara perayu membalas dengan mengatakan bahawa responden-responden telah melanggar perjanjian apabila gagal untuk membayar baki deposit pada 6 Februari 1991 dan dengan itu membatalkan perjanjian tersebut. Walau bagaimanapun, perayu masih bersedia untuk meneruskan dengan perjanjian tersebut pada harga yang sama tetapi tertakluk kepada baki 10% deposit perlu dibayar dalam tempoh tujuh hari daripada 3 Ogos 1991 dan baki harga belian dibayar dalam tempoh satu bulan daripada tarikh bayaran deposit. Responden-responden tidak bersetuju bahawa baki harga belian perlu dibayar dalam tempoh sebulan daripada tarikh bayaran deposit. Peguamcara perayu dengan itu memulangkan semula deposit RM1,000 yang dibayar sebelum ini dengan menyatakan bahawa tiada perjanjian yang disimpulkan. Responden-responden memfailkan guaman ini memohon perlaksanaan spesifik PJB dan secara alternatifnya menuntut ganti rugi untuk pelanggaran kontrak. Pesuruhjaya kehakiman ('PK') yang bijaksana membenarkan tuntutan responden dan mengarahkan perjanjian jual dan beli secara rasmi dibuat antara pihak-pihak berdasarkan terma-terma seperti yang dipersetujui pada 5 Februari 1991. Tidak berpuas hati dengan keputusan tersebut, perayu memfailkan rayuan ini mendakwa PK terkhilaf dengan memutuskan bahawa terdapat satu kontrak terbuka. Responden-responden menghujah bahawa sebuah kontrak terbentuk pada 5 Februari 1991 apabila responden-responden membayar RM1,000 sebagai sebahagian deposit.

Diputuskan, membenarkan rayuan dengan kos:

- (1) Cek-cek yang dikeluarkan oleh responden-responden pada 6 Februari 1991 adalah tidak berguna memandangkan tiada dana mencukupi di dalam akaun tersebut. Tambahan pula, angka yang dinyatakan di dalam cek-cek tersebut juga tidak betul. Tarikh-tarikh juga adalah salah. Responden kedua mengakui bahawa terdapat dana yang tidak mencukupi di dalam akaun dan bahawa dia dengan sengaja meletakkan

- A tarikh berlainan dan angka-angka salah ke atas cek-cek tersebut. Nama perayu yang ditulis dalam tulisan Cina juga tidak lengkap (lihat perenggan 20).
- B (2) Responden-responden bukan sahaja tidak menjalankan peranan mereka seperti yang sepatutnya tetapi tidak bersedia berbuat sedemikian. Perayu tidak boleh dipersalahkan dengan menamatkan kontrak disebabkan kesalahan dan kegagalan responden-responden sendiri. Diputuskan bahawa seorang litigan tidak boleh mendapat faedah daripada kesalahannya sendiri (lihat perenggan 23–24).
- C (3) Daripada fakta matriks perkara tersebut, syarat mengenai bayaran baki harga belian merupakan terma penting kontrak. Terma ini tidak dipersetujui oleh pihak-pihak. Pihak-pihak tidak sependapat tentang isu penting bayaran harga belian. Apabila terma penting ini tidak dipenuhi, tidak akan wujud kontrak yang disimpulkan (lihat perenggan 31).
- D (4) Campur tangan rayuan adalah penting dan akan mengambil tempat di dalam kes-kes di mana terdapat kekurangan penghargaan kehakiman berhubung keterangan. PK telah tersilap besar apabila memutuskan bahawa ‘kontrak jualan di antara pihak-pihak telah wujud pada 5 Februari 1991’. Keterangan yang dikemukakan tidak menyokong dapatan tersebut (lihat perenggan 32–33).]
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Notes

For cases on concluded contract, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4643–4662.

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1217–1245.

For cases on specific performance, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6193–6203.

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Cases referred to

Annamalay Retnam v Mah Chong Peng & Anor [2010] MLJU 449; [2010] 6 CLJ 487, CA (refd)

H *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

Chung Hwa Ying v Phang Mun Mooi & Anor [1987] 2 MLJ 693, SC (refd)

I *Clarke v Edinburgh & District Tramways Co* 1919 SC (HL) 35 (refd)

Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal [1997] 2 MLJ 465; [1997] 3 CLJ 189, CA (refd)

Eng Thye Plantations Bhd v Lim Heng Hock & Ors [2001] 4 MLJ 26; [2001] 4 CLJ 245, CA (refd)

- Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302, SC (refd) **A**
- Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97, CA (refd)
- Powell and Wife v Streatham Manor Nursing Home* [1935] AC 243, HL (refd)
- Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545, CA (refd) **B**
- Su Wee Lip @ Philip Su v Hj Lassim Abdul Rahman* [2009] 1 MLJ 580, CA (refd)
- Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, FC (refd)
- Wong Ngee Yew and others v Ng Yoon Thai and others* [1941] 1 MLJ 37 (consd) **C**
- Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2012] 5 MLJ 319; [2012] 1 LNS 250, CA (refd)
- Ng Chew Hor (Ng, Fan & Associates) for the appellant.*
- Albert Ding Choo Earn (Woon Wee Yuan & Partner) for the respondents.* **D**

Balia Yusof JCA:

- [1] The respondents are brothers and partners in a firm known as Sin Yong Wah Metal Works. The appellant is a company owning two pieces of land located in Masai, Johor with a double storey shop house erected on each of it. **E**
- [2] Sometime in early February 1991, the respondents agreed to buy the two shop houses at a price of RM145,000 each from the appellant. **F**
- [3] On 5 February 1991 the respondents paid a deposit of RM1,000 to the appellant and both parties agreed that the balance of the deposit amounting to RM28,000 was to be paid on 6 February 1991. The deposit agreed by the parties was RM29,000 being 10% of the total purchase price of the two shop houses amounting to RM290,000. The RM1,000 was received from Sin Yong Wah Metal Works. The receipt issued by the appellant states 'being payment of deposit for shop house 146 & 147 and balance of 10% of the price (RM290,000.00) will be paid on 6.2.1991'. The receipt was signed by the director of the appellant. **G**
- [4] On 6 February 1991 the appellant at an EGM passed two resolutions to sell the properties to the respondents at the price agreed but subject to the terms and conditions contained in the sale and purchase agreement to be entered into. **H**
- [5] On the same day, the respondents deposited with their solicitors a cheque in the sum of RM28,000 being payment of the balance of the 10% deposit. The solicitors also prepared two sale and purchase agreements for the said two **I**

- A shop houses and each of the respondents signed it. However, instructions were given to the solicitors not to release the said cheque to the appellant until the latter had executed the sale and purchase agreements and had obtained the redemption statements on the properties.
- B [6] On 3 June 1991, about four months later, the respondents' solicitors wrote to the appellant requesting for the redemption statement and informed the appellant that they had prepared the sale and purchase agreements. The solicitors further informed the appellant that they had also been instructed by
- C the respondents not to pay the deposit to the appellant unless they received the redemption statements.
- D [7] By a letter dated 3 August 1991, the appellant's solicitors replied saying that the respondents had breached the agreement in failing to pay the balance of the deposit on 6 February 1991 and as such had repudiated the agreement. Nevertheless, the appellant was still prepared to go on with the deal at the same price but subject to:
- E (a) the balance of 10% deposit be paid within seven days from 3 August 1991; and
- (b) the balance of the purchase price be paid within one month from the date of payment of the deposit.
- F [8] The respondents' solicitors wrote back and intimated that the respondents were agreeable to the new terms but did not agree that the balance purchase price was to be paid within one month of the date of payment of the deposit. Instead, the respondents proposed three months plus one month extension and paying interest on the balance for the extension period.
- G [9] By their letter dated 25 August 1991 the appellant's solicitors replied stating the appellant's disagreement and refunded the RM1,000 deposit paid earlier stating that no agreement has been concluded.
- H [10] The respondents filed a suit against the appellant among others seeking for a specific performance of the sale and purchase agreement and alternatively claiming damages for breach of contract. The appellant counterclaimed for the renewal of the caveat on the lands as well as for general damages.
- I [11] The learned judicial commissioner ('JC') allowed the respondents' claim and ordered a formal sale and purchase agreement be made between the parties on the terms as agreed on 5 February 1991. The appellant's counterclaim was dismissed with costs.

[12] Being dissatisfied with the decision, the appellant filed the instant appeal. There is no appeal against the dismissal of the counterclaim. A

[13] Before us, it was submitted by learned counsel for the appellant that in allowing the respondents' claim for specific performance of the agreement, the learned JC had erred in ruling that there was an open contract. The ruling prayed for by the respondents was for specific performance of the agreement as stated in paras 5–7 of the statement of claim. In his submissions, learned counsel says nowhere did the respondents plead an open contract as the basis of their claim. For holding that there was an open contract concluded between the parties, the learned JC had therefore erred in deciding not on the pleaded case of the respondents. Learned counsel submitted that there was no concluded contract between the parties and taking the evidence in its totality the finding of the learned JC is unsupported by evidence. B
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[14] Learned counsel for the respondents submitted there was a contract formed on 5 February 1991 when the respondents paid RM1,000 as part of the deposit for the purchase of the two shop houses. Relying on *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625 learned counsel submitted, as there was an offer and an acceptance and there was consideration, certainty of parties, certainty of price and certainty of the subject matter being the two shop houses, there was a concluded and valid agreement between the parties. D
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[15] We heard submissions of both parties, both written and oral. We have also perused the findings of the learned JC and having done so we unanimously allowed the appeal by the appellant. F

[16] We agreed with the submissions and the points brought up by the learned counsel of the appellant that the learned JC had erred in finding there was 'a concluded open contract of sale of the shop houses to the Plaintiffs (Respondents) which the Defendant (Appellant) had wrongfully terminated' (see p 50 *rekod rayuan jilid 1*). G

[17] At p 37 of the same, the learned JC had found the following: H

To my mind, there was an offer by the defendant and acceptance by the plaintiffs, and there was consideration, certainty of parties, certainty of price and certainty of property. In addition, there was the act of part performance by the plaintiffs in paying the earnest deposit of RM1,000.00 on 5.2.1991. In the circumstances, there was nothing in the way of this court concluding that an open contract was formed between the parties at the time of payment of the RM1,000.00 deposit on 5th February 1991. I so found. As laid down in *Charles Grenier*, such an agreement is enforceable as if it was embodied in a sale and purchase agreement. I

A [18] And later, at p 49 Her Ladyship went on to say:

The Contract of Sale between the parties had crystallized on 5.2.1991. The subsequent correspondences between the parties after 6.2.1991 were negotiations on the payment of the balance deposit as well as the terms of payment of the balance of the purchase price. The parties had already agreed on the terms of payment of the balance deposit, but renegotiated it anyway. The result was the defendant decided to extend time.

C [19] Going back to the facts of the case, what was paid on 5 February 1991 was only RM1,000 which was part of RM29,000 agreed as the 10% deposit for the purchase of the said two shop houses. The balance sum of RM28,000 was to be paid the next day, 6 February 1991. But what actually happened on that day was that instead of the RM29,000 being paid to the appellant, it was paid to the solicitors of the respondents who was told to withhold it until the appellant had executed the two sale and purchase agreements and had obtained the redemption statements on the two properties.

E [20] As submitted by learned counsel for the appellant, we agree that the two cheques issued by the respondents on 6 February 1991 were useless as there were insufficient funds in the account of Sin Yong Wah Metal Works Sdn Bhd from which the initial RM1,000 deposit was paid. After clearance of the said amount of RM1,000, the account of the said Sin Yong Wah Metal Works Sdn Bhd would only stand at RM10,859.64 (p 238 *jilid 4 rekod rayuan*). That would not be sufficient to pay the balance of 10% deposit. Coupled with that, it was further demonstrated to us that the figure stating the amount in the said two cheques was also incorrect. It showed the amount of RM1,900 and RM9,000 and the dates were also wrong. They were dated on 8 February 1991 and 4 March 1991 but later corrected to 6 February 1991 (see pp 243–244, *jilid 4 rekod rayuan*). PW1, the second respondent during cross-examination by the appellant's counsel admitted that he issued the cheques and there was insufficient funds in the account. He also admitted he purposely put a different date on the said cheques and the wrong figure. He further admitted the appellant's name which was written in Chinese characters was incomplete (pp 81–82 *jilid 2 rekod rayuan*).

I [21] The learned JC seemed to have ignored this fact and went on to find that there was sufficient monies in the first respondent's ('PW2') savings account and his wife's saving account which could be transferred to the account of Sin Yong Wah Metal Works Sdn Bhd. The first respondent produced his savings account books (exhs P1, P2 and P3) which showed a total amount of RM8,690.86 as at 6 February 1991 which he said was for the purchase of the properties. Learned counsel for the appellant submitted that the learned JC has overlooked the fact that even with the said amount it was still not enough to

pay the balance sum which was due on 6 February 1991. It totals up to merely RM19,550.50, much too less than the amount due of RM28,000.

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[22] The learned JC turned to the evidence of PW3, the wife of the second respondent who produced one Maybank Savings Account book in her name (exh P5) and another Maybank Savings Account book in a joint name with her father (exh P6) PW3 too said the monies in the two accounts were for the purchase of the said properties. The learned JC upon perusing the said two accounts concluded that as at 6 February 1991 from the two accounts the respondents had a total of RM11,165.34 which together with the other accounts were sufficient to pay the balance of the 10% deposit.

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[23] We agree with the submissions of the appellant's learned counsel that the respondents were not only unable to perform their part of the bargain but were unwilling to do so. If at all the evidence of the respondents were true and that too of PW3, the wife of the second respondent, there was no evidence to indicate that all the monies that they have in their personal savings account and that of the joint account with PW3's father were actually meant for the purchase of the two shop houses. Monies from the savings account could easily have been withdrawn and together with the account of Sin Yong Wah Metal Works Sdn Bhd would be sufficient to pay the RM28,000 balance. But the respondents chose not to do so. Instead, the first respondent deliberately issued two wrong cheques and gave further conditions to their solicitors not to forward the said two cheques to the appellant. The intention of the respondents showed otherwise.

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[24] We agree that the appellant could not be blamed for terminating the contract on the fault and failure of the respondents themselves. It is settled that a litigant cannot benefit from his own wrong. Put it in another way, in a contract, a party ought not be permitted to take advantage of his own breach (*Su Wee Lip @ Philip Su v Hj Lassim Abdul Rahman* [2009] 1 MLJ 580, *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302).

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[25] The learned JC has in our view failed to appreciate these facts.

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[26] It was further submitted by learned counsel for the appellant that the absence of a concluded open contract contrary to what was found by the learned JC can easily be discerned from the fact that the parties went on to negotiate the terms for payment of the balance purchase price. In fact, the learned JC had also found that the parties had renegotiated on the terms of payment of the balance deposit and purchase price.

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[27] After the failure of the respondents to pay the balance of the deposit, the

A appellant had by its solicitors' letter dated 3 August 1991 (p 247 *jilid 4 rekod rayuan*) intimated that it is still prepared to sell the said two shop houses at the same price but on the following new terms, namely:

- (a) the balance 10% deposit be paid within seven days from the date hereof;
and
B (b) the balance purchase price be paid within one month from the date of payment of the deposit.

C [28] The said letter also stated in no uncertain terms that the appellant was making a new offer for the sale of the aforesaid properties.

[29] In response to this new offer, the respondents made a counter proposal as per their solicitors' letter dated 13 August 1991 (p 280 *jilid 4 rekod rayuan*). Although agreeing to the price of RM145,000 per shop house and the 10% deposit, the respondents requested for a period of three months with an extension of one month for payment of the balance purchase price. The respondents also informed the appellant that they are agreeable to pay interest on the balance of the purchase price during the said extension period of one month. However, this was rejected by the appellant through its solicitors' letter dated 25 August 1991 (p 251 *jilid 4 rekod rayuan*) and returning the respondents' RM1,000 deposit.

[30] Clearly, there was no agreement reached between the parties. The parties had failed to agree on one of the most important and fundamental terms in a sale and purchase agreement of this nature, that was the payment of the purchase price. From the factual matrix of the matter, it is not difficult to recognise that the stipulation as to payment of the balance purchase price was a fundamental term to the contract. This term had not been agreed to by the parties.

[31] We are of the view that had the learned JC properly addressed her mind to these facts, it is not difficult to see that the parties were not *ad idem* on that fundamental issue of payment of the purchase price. With this fundamental term left unsatisfied, there could not have been a concluded contract.

[32] Appellate interference is necessary and will take place in cases where there has been an insufficient judicial appreciation of evidence. What judicial appreciation of evidence means has been lucidly explained by Gopal Sri Ram JCA in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 (see also *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229).

[33] In our view the learned judicial commissioner has seriously fallen into

error in concluding that ‘the contract of sale between the parties had crystallised on 5 February 1991’. The evidence tendered does not support that finding.

[34] While it was submitted before us that the learned JC had erred in deciding the case on matters which were not pleaded by the respondents and the court was making a contract for the parties, we are however, not prepared to hold that far. We are always mindful that we will only interfere with the finding of the trial court if either we can detect that the trial court has applied a wrong principle, or has taken into account matters that are in law irrelevant or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at. It has also been said in a long line of authorities that we at the appellate court will generally not disturb or interfere with the finding of facts made by the trial court unless that finding is not supported by evidence, or is against the weight of evidence or there was no proper judicial appreciation or evaluation of the evidence (see *Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal* [1997] 2 MLJ 465; [1997] 3 CLJ 189, *Clarke v Edinburgh & District Tramways Co* 1919 SC (HL) 35, *Annamalay Retnam v Mah Chong Peng & Anor* [2010] MLJU 449; [2010] 6 CLJ 487, *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2012] 5 MLJ 319; [2012] 1 LNS 250, *Powell and Wife v Streatham Manor Nursing Home* [1935] AC 243, *Sivalingam all Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545, *Eng Thye Plantations Bhd v Lim Heng Hock & Ors* [2001] 4 MLJ 26; [2001] 4 CLJ 245, *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517, *Chung Hwa Ying v Phang Mun Mooi & Anor* [1987] 2 MLJ 693).

[35] We are loath to differ with the finding made by the learned JC. But as an appellate court and having perused the appeal records, we are entitled to draw our own inference from the evidence available and which the learned JC has failed to sufficiently consider. Mc Elwaine CJ in *Wong Ngee Yew and others v Ng Yoon Thai and others* [1941] 1 MLJ 37 at p 43 stated:

An appellate court should be very loath to differ on a finding of fact by a court which has seen and heard the witnesses but if the learned judge can be shown to have misdirected himself on the evidence, or to have rejected evidence for a wrong reason or to have drawn an inference from evidence which was equally capable of supporting a different inference it may be the duty of an appellate court to interfere.

[36] With these principles in mind, we are persuaded by the submissions of learned counsel for the appellant that the learned JC has erred in allowing the respondents’ claim for specific performance of the contract by asking the

A parties to enter into a formal agreement for the sale and purchase of the two shop houses incorporating the terms they agreed for on 5 February 1991.

[37] Accordingly the appeal is allowed and we set aside the order of the learned JC. Costs of RM30,000 is awarded to the appellant being costs here and below. Deposit to be refunded.

Appeal allowed with costs.

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Reported by Kanesh Sundrum

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